



Mediate - or Litigate?

by Robert N. Bass, Esq. Attorney at Law, Phoenix, AZ
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There is an old saying, "It's difference of opinion that make horse races." I suppose the same can be said for lawsuits.

In business transactions, disputes happen. This is especially true in residential real estate transactions, where there are more than merely business issues at stake. A house is more than just a building: it is a home, it is hopes, it is dreams. Emotion plays a significant role in many home purchases, and if things don't go right, these emotions can lead to disappointment, anger and even rage. Our society (or most of it, anyway) has evolved beyond resolving disputes with our fists, or with a six-gun. Today, we just sue!

Studies have shown that most residential real estate problems involve relatively modest sums: the amount in controversy in most disputes is less than \$7,500. If a lawsuit is filed over a dispute like that, the collective attorney's fees can quickly dwarf the amount in dispute; a phenomenon we refer to as "the tail wagging the dog." In such cases, our legal system is often an inefficient, impractical, frustrating and very expensive mechanism. I can confidently speak for countless litigators who will tell you that litigation is misery... it is the worst way to resolve disputes. Alas, it is also the best system that mankind has been able to come up with.

Thus the trend in recent years toward finding alternative forms of dispute resolution. The courts in my home state of sunny Arizona and elsewhere have themselves responded to this problem by assigning

many cases involving disputes where the amount in controversy is below a certain dollar amount (say, \$50,000) to a Court-appointed Arbitrator. In most instances, these cases are resolved without a jury trial.

The organized real estate industry has in many states also responded to this problem by encouraging the parties to transactions to agree to submit any disputes first to mediation before resorting to litigation. The National Association of REALTORS® (NAR) has developed and supported an alternative Dispute Resolution System, or DRS, which features Rules and Procedures designed to facilitate a prompt and fair resolution of transactional disputes. This program has been enthusiastically adopted by the Arizona Association of REALTORS® (AAR) and its local affiliates. The AAR publishes a "generic" Mediation clause and incorporates it into all of their published contract forms. For example, the AAR's current form of Residential Resale Purchase Contract contains the following clause:

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Mediate - or Litigate?

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“Mediation: Any dispute or claim arising out of or relating to this Contract, any alleged breach of this Contract or services provided in relation to this Contract shall be submitted to mediation in accordance with the Rules and Procedures of the NATIONAL ASSOCIATION OF REALTORS® (NAR) Dispute Resolution System, or, if not available, another mediation provider. Disputes shall include representations made by the Buyer, Seller or any Broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the Premises to which this Contract pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding.”

The mediation clause provides an exemption for the filing of certain types of actions, such as a foreclosure, an eviction, a mechanic's lien or a lawsuit filed to allow the recording of a Lis Pendens (a notice of pending action), etc. However, these exemptions do not affect the parties' obligation to submit the dispute to mediation. The costs of mediation are shared equally by the parties, unless otherwise agreed.

The language of the mediation clause is mandatory, and it is clearly designed to cover even those disputes which arise after the close of escrow. Indeed, how could a seller, for example, file to foreclose upon a mortgage or a deed of trust before it is recorded (at closing)?

In order to appreciate the value of mediation, it is important to understand exactly what a mediator does—and does not—do. The trained mediator is impartial, and will not give legal advice or pass judgement on the correctness of a party's position. Nor does a mediator issue a binding decision. Rather, the mediator will help the parties to identify and articulate their issues, and help them explore alternatives, moving them toward reaching an agreement as to how to

resolve them. This is usually accomplished through face-to-face negotiations, perhaps followed by some “shuttle diplomacy” with the combatants in separate rooms, and all negotiations are conducted in a non-adversarial atmosphere.

If the parties are able to successfully reach a resolution, they will sign a binding settlement agreement. If the mediation is unsuccessful, the parties are free to pursue any other avenue of legal redress.

Does it work? Well, the track records of the private firms that have handled hundreds of mediations for most of the central Arizona REALTOR® Associations is pretty impressive. Of the cases submitted to mediation so far, over 80% have settled. Not bad!

My personal experience with mediation is even better than that. Now, most of my clients are real estate licensees and brokerage companies, so I've had the opportunity to attend more than a dozen mediation sessions to date. Most of those cases were very difficult; indeed, many of the parties were dug in deep and not very receptive to further discussion. All of those cases settled. I'm a believer.

The contractual agreement to mediate provides an opportunity for the parties to a dispute to resolve their differences in an efficient, non-adversarial and relatively inexpensive manner. It is almost cliché to talk about “the expense and delay of litigation,” but hey... it's the truth. Lawsuits take a lot of time and cost a lot of money. Litigants are hardly ever happy, even if they “win.” As Abraham Lincoln so wisely admonished us, “Discourage litigation; persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses and waste of time.” Couldn't have said it better myself!

Reprinted with permission from Robert N. Bass, Esq. Robert Bass is the former Administrative Law Judge for the Arizona Department of Real Estate. His law practice concentrates in representing and defending real estate licensees in litigation and in license complaint cases. He is a nationally known speaker and author on Risk Reduction.

Every fourth year, two of the five real estate commissioners are replaced (other years only one commissioner is replaced). This is the year that the Governor has appointed two new members to the Utah Real Estate Commission. Those new members are Danny M. Holt and Tom Morgan.

Tom is a member of the Salt Lake Board of Realtors where he served as the 1999 chair of the Education Committee. Tom is also a certified continuing education instructor for the state of Utah.

Danny M. Holt was born in St. George, Utah and has spent most of his life in Southern Utah.

For the past four years, Danny has served as principal broker for two major franchise brokerages, most recently as broker/owner for Re/Max First Realty in St. George. In 1998 Danny was awarded the "Re/Max Eagle Award" for doubling office in a single year. He was also recognized for over 150 million dollars of business in 1999.

Currently the President of QuestStone Management Inc, Danny is involved in real estate training. He is also the current vice president of the Washington County Board of REALTORS, and has served two consecutive three-year terms of the Washington County Planning Commission.

Danny lives in Brookside, Utah and has six wonderful children (according to him) and five beautiful grandchildren (according to his wife).

Tom Morgan has had over 40 years of experience in the real estate industry, the last 28 years as a real estate broker. He is currently an associate broker with Mansell & Associates where he serves as the corporate mediator.

Tom graduated from the University of Utah with a degree in Business Management. He became principal broker with Cambridge Realty in 1974, then he affiliated with Mansell & Associates in 1987.



Purpose: To provide licensees with the information and education they need to be successful in competently serving the real estate consumer

Editor Karen Post
Layout Jennifer Eatchel
Regular Contributors Ted Boyer
 David Jones
 Shelley Wismer

Real Estate Commission:
Chairman--A. Thompson Calder
Vice Chairman--Julie Mackay
Commissioners--A. Lynn Snow, Danny
M. Holt, Thomas M. Morgan

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We've Done it Again!

For the second time in one year, the Division of Real Estate has won another national award for a real estate education program! We're on a roll!

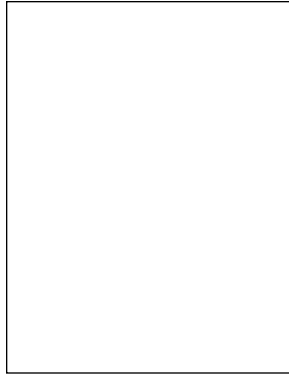
The Real Estate Educators Association (REEA) has awarded the "2000 - Education Program of the Year" to the Division for the production of the "Licensee Safety Course." This course was developed last year in conjunction with the office of Utah Attorney General after two Utah female licensees were raped while innocently going about their daily business of selling real estate.

Karen Post and Babs DeLay taught a synopsis of the course at the REEA convention in Las Vegas last June. It was considered to be such a timely topic and such a good course, that it was suggested that they teach the course again at next year's convention. Through that exposure at the REEA convention, the course has been gaining national recognition as other real estate educators across the country are beginning to teach it.

The course also deals with how the licensee can help the seller to protect his home and family during the term of a listing. To that end, a pamphlet has been prepared and distributed to real estate licensees in the state for them to give to their sellers when taking a listing. Check with your local boards of REALTORS for that pamphlet, or if you are not a member of a board or association of REALTORS, call the Division of Real Estate at 530-6747.



Karen Post Announces Retirement



It is with envy and regret that we announce that, after over seventeen years of dedicated and creative service to the Division of Real Estate, Karen Post has announced her early retirement effective after the first of the year. We envy that she can retire early, and regret that we will no longer be able to work with her on a daily basis.

For the last several years, Karen has supervised the education and licensing functions of the Division. In addition to her daily duties, Karen has organized and presented an annual Instructor Development Workshop for all real estate and appraiser instructors in the state. She also produces the annual Core Course video tape.

Karen has won numerous education awards over the years for education programs she has developed for Utah licensees. Most recently, Utah was awarded with the "1999 Education Excellence Award" by the Association of Real Estate License Law Officials, for our "Total Real Estate Education Program." In June, the Real Estate Educators Association awarded to Utah the "Education Program of the Year 2000" for the Real Estate Licensee Safety Program that was developed by the Division in conjunction with the office of the Attorney General.

We will miss her dearly, but will undoubtedly see her as she undertakes new adventures in the private sector.

Please Note

Once a real estate license has been revoked by the Division, Utah law says that the revoked person cannot apply for another license for five years. What about people who are revoked because the fingerprint check found an undisclosed criminal history he/she had failed to disclose?



The Assistant Attorneys General for the Division have clarified that this same five year bar on a new application also applies to licensing candidates who lied on their qualifying questionnaire and have, thereby, been revoked. These people will also not be able to reapply for a license for five years.

List of Top 10 Consumer Complaints

The Real Estate Council of British Columbia recently formed a focus group of handlers of consumer complaints against real estate licensees. Information was obtained from regulators, lawyers in private practice, courts, real estate boards, consumer advocacy organizations, providers of Errors and Omissions Insurance, and other professional organizations. Following are the 10 top consumer complaints which were compiled from this focus group. The information is taken, in part, from the Real Estate Council of British Columbia's Report from Council.

1. Failure to adequately research and/or misrepresentation of property features. For example, licensees often state that certain items in the property will be included with the property, but after completion, these items are missing. If a buyer specifically would like an item (e.g., valances or accessories for a central vacuum) to remain with the property, be sure that each is specifically addressed in the contract.

Another example is square footage. Licensees should be careful to measure the area themselves prior to making a representation about the size or have a measuring company take the measurements. Licensees should not simply rely on information provided to them by the seller or the listing information.

2. Seller wanting cancellation or unconditional release from listing

contract because of inadequate service or personality issues.

Many consumers feel that their agents do not properly service the listings, e.g., insufficient advertising, no open houses, lack of communication with the owner about interest in the property.

Another consumer complaint is that licensees verbally advise at the time the listing is taken that the listing can be canceled at any time, but when the consumer wants to cancel, the licensee or his/her employing broker refuses or is reluctant to do so.

3. Poor drafting of contracts of purchase and sale. There are often insufficient clauses in the contract to protect consumers. Some examples are the absence of "subject to inspection" or "subject to receipt of independent legal advice" clauses. Some contracts also create logistical problems by setting the completion and possession on the same days.

4. Consumers have a perception that a licensee's advice and actions are influenced more by the self-interest of the agent than the protection of the client's interest. Some consumers feel, for example, that licensees try to "upsell" them into a property the buyer cannot afford, so that the agent will receive more commission, or, are pushing their client to buy something, so that the licensee will earn a commission.

5. Material information is either misinterpreted by the licensee or not communicated clearly to the consumer. Licensees should clearly explain all the costs associated with a real estate transaction, including (but not limited to) inspection and survey fees, legal fees, property transfer tax and the fact that GST is applicable to commission.

Another example is that licensees do not disclose the non-financial charges registered against title to the buyer, including charges in favor of municipalities and public utilities.

6. Mortgage fraud. This is a very serious concern. Licensees have been suspended and criminally charged for creating or participating in the creation of false employment letters and other related documents, including "secret" addenda for the purpose of obtaining 100% financing.

7. Seller not releasing deposit. This is a great source of frustration for consumers. Licensees very often do not explain the nature of the [*in Utah: Real Estate Trust Account*] and buyers are frustrated when they do not automatically have their deposit returned if they do not remove a subject clause.

8. Negligent property management. This area of complaint includes poor record keeping and

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Top 10 Complaints

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financial management and not meeting client service expectations (e.g., arranging repairs and delays in the return of security deposits).

9. Closing transactions. Consumers complain about the lack of follow through on the part of licensees during the conveyance process, especially with provision of keys, dealing with issues that may arise “post-closing” and the delay in providing necessary information to conveyancing lawyer/notaries.

10. Lack of assistance to the consumer in doing research about properties, especially strata units. This type of complaint includes not obtaining information from municipalities (occupancy permits, zoning issues) and also about strata properties (minutes of meetings, information about special assessments).

By making licensees aware of the type of complaints that consumers have, it is hoped that licensees will use the information to improve their practice, thereby increasing consumer satisfaction and reducing the potential for complaints and litigation.

Reprinted in part from the Real Estate Council of British Columbia's Report from Council.

Real Estate Disciplinary Sanctions



BOYER, NIKKI R., Sales Agent, Salt Lake City. Consented to pay a \$1,000 fine and complete a two-hour course in the real estate administrative rules, based on failing to inform her principal broker about a transaction, on failing to deliver earnest money to her principal broker, and on participating in an offer in which there was no earnest money on deposit which could be claimed by the seller in the event of the buyer's default. #RE99-01-08.

BYYHOME, BYYHOME LLC, and J. WOODLEY, Medina, WA. Cease and Desist Order issued July 3, 2000 prohibiting Respondents from, in exchange for compensation, offering the ByyHome program to prospective buyers who live in Utah or to prospective sellers of Utah property, and from offering to refer buyers and sellers to real estate brokers until such time as ByyHome becomes licensed as a broker in Utah. #RE20-07-01.

CAULEY, M. CAD, Sales Agent, Wardley GMAC Real Estate, Salt Lake County. Consented to pay a \$750.00 fine and take a course in contract law, based on offering to purchase properties in the name “M. Cad Cauley or assigned” because he did not want the sellers to know the identities of the prospective buyers. Mr. Cauley maintains in mitigation that he no longer writes offers this way and now indicates that the offer is made on behalf of “an undisclosed buyer.” #RE98-02-06.

CHRISTENSEN, CHRISTOPHER T., Sales Agent, Salt Lake City. Renewal denied based on plea in abeyance to Assault, and failure to disclose the pending assault charges on his 1998 application for reinstatement.

DAVIDSON, JULIA F. (SANDY), Principal Broker, RE/MAX All Eagles Realty, Orem. Consented to pay a \$1,000.00 fine based on failing to keep brokerage records up to date and on submitting to the Division a trust account reconciliation which was made to appear to balance although she had not been able to actually reconcile the account. Ms. Davidson maintains in mitigation that she provided the document to the Division instead of asking for the extension she needed to complete a correct reconciliation, and that she would not have done so if her judgment had not been affected by pain medication which had been prescribed by her doctor. #RE33-00-02.

EARLE, NATALIE, Sales Agent, Wardley GMAC Real Estate, Salt Lake County. Consented to pay a \$750.00 fine and take a course in contract law, based on filling out two REPC's in which she showed the buyers as “M. Cad Cauley or assigned” because she did not want the sellers to know the identities of the prospective buyers. Ms. Earle maintains in mitigation that she no longer writes offers this way and now indicates that the offer is made on behalf of “an undisclosed buyer.” #RE98-02-05.

EVES, JOYLENE K., Principal Broker, Hidden Vale Management, Inc., Orem. License surrendered effective August 16, 2000 in lieu of responding to the Division's investigation of an allegation that the amount on deposit in the property management trust account was short of the trust liability. #RE33-99-01.

EVES, PAUL G., Sales Agent, Hidden Vale Management, Inc., Orem. License surrendered effective August 16, 2000 in lieu of responding to the Division's investigation of an allegation that the amount on deposit in the property management trust account was short of the trust liability. #RE20-08-13.

HART, ANN, Sales Agent, Inactive, Salt Lake City. Consented to pay a \$1,000 fine and complete a two-hour course in the real estate administrative rules, based on failing to inform her principal broker about a transaction and on structuring a transaction so that the buyer's "earnest money deposit" was to be used to pay the buyer's expenses instead of being held as security for the seller. In mitigation, when the transaction failed and the seller made a claim for the buyer's \$500 earnest money deposit, Ms. Hart paid the seller \$500 out of her own funds. #RE99-02-05.

HAWK, THOMAS C., Associate Broker, Midvale. Application for renewal granted on probationary status on the condition that he will be required to submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about his 1999 DUI and his April, 2000 guilty plea in abeyance to Telephone Harassment.

HOFF, COREY, Sales Agent, Draper. License renewed on probationary status based on misdemeanor convictions. Mr. Hoff is required to provide a written acknowledgement from his principal broker that he has disclosed the convictions to his broker before the Division will renew him with that broker.

HULL, MATTHEW J., West Jordan. Application for sales agent license granted on probationary status on the condition that he will be required to submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about his 1999 shoplifting conviction.

JOHN, ROBERT, Inactive Sales Agent, Ogden. License renewed on probationary status based on a guilty plea in abeyance to a misdemeanor crime. If Mr. John activates his license, he will be required to provide a written acknowledgement from his principal broker that he has disclosed the plea in abeyance to his broker before the Division will activate him with that broker.

JOHNSON, LANCE R., Sales Agent, Sandy. Application for sales agent license granted on probationary status on the condition that he will be required to submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about his past convictions.

KESSLER, JAY L., Sales Agent, Taylorsville. Application for sales agent license granted on probationary status on the condition that he will be required to submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about his having failed to deposit earnest money in a transaction when he was previously licensed as a sales agent. In mitigation, since the time when he was previously licensed, Mr. Kessler has been admitted to the Utah State Bar and has been involved in public service.

LOVE, MICHAEL J., Sales Agent, Ogden. License renewed on probationary status on the condition that he will be required to

submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about his 1997 Disorderly Conduct conviction. Mr. Love failed to disclose the 1997 conviction on his April, 1998 application for renewal. In mitigation, Mr. Love did report the conviction to the Division on his April, 2000 renewal.

LUCIDO, FARA, Inactive Sales Agent, Laguna Hills, CA. Renewal denied based on failing to disclose a DUI conviction to the Division within ten business days of conviction, failing to pay the fine in that case in a timely manner, and failing to attend license renewal hearings.

MICZO, ALAN J., Sales Agent, Salt Lake City. Surrendered his right to submit an application for renewal and agreed not to reapply for at least five years in lieu of responding to the Division's investigation of a complaint filed against him. In addition, Mr. Miczo consented to pay a \$1,000.00 fine based on the failure to respond to the Division's investigation of the complaint. #RE99-10-05 and RE20-03-20.

PEHRSON, AARON J., Sales Agent, South Jordan. Conditional license revoked June 8, 2000 after the criminal background check required of new sales agents revealed that he failed to disclose a 1997 Minor in Possession of Alcohol conviction. After a post-revocation hearing, the Commission and the Director concluded that Mr. Pehrson had no intention to deceive on his application. His license was reinstated July 20, 2000. #REFP20-06.

RAVEN, LANCE M., Sales Agent, Lehi. Application for sales agent license granted on probationary status on the condition that he will be required to submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about the citations he received for working as a contractor without a license.

RICHINS, MICHAEL J., Sales Agent, Salt Lake City. Conditional license revoked June 12, 2000 after the criminal background check required of new sales agents revealed that he failed to disclose a 1996 misdemeanor battery conviction. After a post-revocation hearing, the Commission and the Director concluded that Mr. Richins had no intention to deceive on his application. His license was reinstated July 20, 2000. #REFP20-07.

SANCHEZ, PAUL S., Bountiful. License issued on probationary status based on a past misdemeanor conviction. Mr. Sanchez will be required to provide a written acknowledgement from his principal broker that he has disclosed the conviction to his broker before the Division will activate his license with that broker.

SCRIBNER, BEN W., Sales Agent, Salt Lake City. Application for sales agent license granted on probationary status on the condition that he will be required to submit written acknowledgement from

Property Manager Fined by EPA

The U.S. Environmental Protection Agency recently proposed its first administrative civil penalties totaling \$439,725 against four entities, including a property management firm in Ponca City, Oklahoma, for failing to disclose to tenants information on lead-based paint. The disclosures are required by the Real Estate Notification and Disclosure Rule, a public right-to-know initiative under the Residential Lead-Based Paint Hazard Reduction Act of 1992. In all four cases, the properties contained lead-based paint and were occupied by families with young children.

EPA and the Department of Housing and Urban Development issued joint regulations, known as the "Disclosure Rule," which became effective September 6, 1996. The rule requires landlords or their agents to provide purchasers and tenants with information regarding lead-based paint in homes built before 1978. Under the rule, sellers, landlords, and agents must provide purchasers and tenants with an EPA-approved lead hazard information pamphlet. In addition, the rule allows purchasers a 10-day period to inspect housing units for the presence of lead-based paint in homes built before 1978 and requires that sales and leasing contracts include certain notification and acknowledgment language.

Steven A. Herman, EPA's Assistant Administrator for Enforcement and Compliance, said, "EPA will continue to take action against violators of the Disclosure Rule, an important public right-to-know initiative. There is no more serious environmental problem in American's older homes than lead-based paint. Our young children and pregnant women are the most at risk and must be protected from lead poisoning. EPA has made extensive efforts to educate the real estate community on the requirements of the disclosure rule, and we will take strong enforcement action against violators."

Lead poisoning is cited as the number one environmental threat to American children. High levels of lead can cause damage to the nervous system and wide-spread health problems such as reduced intelligence and attention span, hearing loss, stunted growth, reading and learning problems, and behavioral difficulties. Young children, in particular, are

vulnerable because their nervous systems are still developing. EPA has also issued 22 notices of noncompliance to sellers, brokers and landlords for minor violations.

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R.E. Disciplinary Sanctions

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any principal broker with whom he licenses during the current licensing period that he has informed the broker about his July, 1999 Possession conviction.

TOWNSEND, ROBERT M., Sales Agent, Layton. Application for sales agent license granted on probationary status on the condition that he will be required to submit written acknowledgement from any principal broker with whom he licenses during the current licensing period that he has informed the broker about his multiple convictions which occurred in 1991 to 1993.

Appraiser Disciplinary Sanctions



GROVES, NATHAN, State-Certified Residential Appraiser, Salt Lake City. Consented to pay a \$2,000.00 fine, complete remedial education, and serve a one-year probation of certification, based on complaints filed against him alleging various violations of USPAP. # AP20-05-09, AP99-06-31, AP99-12-12, and AP99-08-06.

RUSSO, CHRISTOPHER, fka CHRISTOPHER FEENEY, State-Registered Appraiser, Elko, NV. Renewal denied effective Sept. 14, 2000, based on failure to meet the licensing criteria of competency, honesty, and integrity. The Board determined that Mr. Russo does not possess a fundamental understanding of appraisal principles, and that he made misrepresentations in appraisal reports.

TROTTIER, TRACY G., State-Certified Residential Appraiser, West Jordan. Application for renewal denied effective August 8, 2000, based on multiple violations of USPAP, knowingly made at the time of the violations.

DREI Designation Awarded to Two Utah Instructors

The Real Estate Educators Association (REEA) awards the Distinguished Real Estate Instructor (DREI) designation to only the finest real estate instructors across the country. Currently only 116 individuals have earned the designation, four of which are Utahns: Arnold Stringham, Martie Stringham, Jim Coleman, and Karen Post. Now we have two more!

BABS DE LAY

Babs DeLay is a national expert on Megan's Law, and she teaches this (and other subjects) throughout the United States - when she's not working 60 hours a week as a full time real estate broker! Her classes include safety protection for agents and clients, NAR Code of Ethics, Marketing, and prelicensing classes taught at Stringham Real Estate School. She has recently certified to teach courses dealing with the concerns of senior citizens when buying or selling real estate.

Babs has been a licensed agent since 1984 and an associate broker since 1992. She has two degrees from Westminster College in three areas: English, business communications, and behavioral science.

Babs has two daughters and two grandchildren, is president-elect of the Rape Recovery Center, and has been a music DJ on KRCL public radio for 21 years (every Thursday morning).

JACK MARINELLO

Jack began his teaching career in 1981 with the Anthony Schools in San Diego, CA. He introduced continuing education courses that year and also taught prelicensing classes. He is now a nationally recognized real estate educator with over 11,000 hours of platform presentation time in front of real estate audiences.

Jack's real estate career spans 21 years of experience in home sales, land development, income property trades, property management, and mortgage brokerage. He is a licensed principal broker in Utah (inactive) and in California.

Jack was the 1999 Chair for the UAR annual convention in Sun Valley, Idaho. He can also be recognized for his stellar roles (as the bad guy) in the Utah Division of Real Estate Core Course videos for 1999 and 2000. Jack currently represents First American Title Agency as Director of Training for Utah and, in this capacity, teaches a myriad of continuing education courses across the state. He also teaches prelicensing courses for Stringham Real Estate Schools. He devotes his professional time to writing, teaching and web-based instructional design.

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The Division of Real Estate is proud of the fine instructors we have in the state of Utah, but especially for those instructors who "go the extra mile," as exemplified by having received this highly recognized national award. We encourage any of our real estate instructors who want to be better at what they do to strive for this designation. It's not easy, but that's what makes it valuable.

### In Memoriam

The Division of Real Estate expresses condolences to the families of the following real estate licensees who have recently passed away:

Geneil W. Brown  
Nancy H. Manning  
Gary K. Powell  
Stephen J. Rees  
Ronald E. Shelton  
Elias W. Smith  
Shirlee E. Tischner

Bountiful  
Provo  
Salt Lake City  
S.L.C.  
West Jordan  
Salt Lake City  
Salt Lake City

## Demand for Back Rent May Violate Federal Law

by Harris Ominsky\*

Let's say a dead-beat residential tenant is four months behind in rent and your attorney sends out a demand letter. It says "you are required to pay within three days from the day of service of this notice, or give up possession of the premises to the landlord. If you fail to pay or to give up the premises, the landlord will commence summary proceedings against you to recover possession of the premises."

Is anything wrong with that letter? According to a recent case, it violates the Federal Debt Collections Practices Act (FDCPA), 15 U.S.C. 1692-1692o. (*Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir, 1998).) As a result, the delinquent tenant here could succeed in a class action against the landlord's attorney for failing to meet all the requirements of the FDCPA.

The tenant in the case did not dispute the fact that it owed four months back rent totaling \$2800. Instead, it attacked the "messenger." The tenant alleged that the notice of delinquency had, among other things, failed to adequately advise her of her rights because she was entitled to a 30-day validation notice, a 30-day period in which to dispute the bill, and the notice "failed to disclose clearly that the defendant was attempting to collect the debt and that any information obtained would be used for that purpose."

### Defenses Raised by Attorney

The landlord's lawyer raised the following defenses:

- He was merely following the three-day notice requirement under New York law before action may be taken against a delinquent tenant.
- Delinquent rent is not "debt" under the FDCPA and the letter was not "debt collection communication."
- The ACT does not apply to lawyers who are serving or attempting to serve a notice which is part of "legal process." Since New York regulates notices to delinquent tenants, the FDCPA is not intended to apply in addition to those local consumer- protection requirements.

The lawyer pointed out that a conflict exists among the circuit courts about whether rent delinquency constitutes "debt" within the meaning of the FDCPA, and that the effect of applying that Act will "require a sea change in the practice as well as open the door to a flood of federal court suits against lawyers..." The Court of Appeals rejected all of the defendant's arguments and refused to dismiss the tenant's class-action complaint. This means that the class action case will now be sent back to the federal district court for trial. It is ironic that the targets in this type of case

become the landlord and his attorney, and not the delinquent tenant who owes back rent and continues to occupy the apartment. Under the Act, violations may be punished by an award of actual damages suffered by the debtor plus an additional "bonus" not exceeding \$1000 and attorneys' fees and other costs.

Beware! In a class action like *Romea*, the award could equal \$500,000. (15 U.S.C. 1692K(a)(2)(B).) The *Romea* case sounds an important wake-up call to landlords and their attorneys that before sending out demand letters they had better study the requirements of the Federal Debt Collection Practices Act.

*\*Harris Ominsky is a partner in the law firm of Blank Rome Comisky & McCauley LLP which has offices in Pennsylvania, New Jersey, Delaware, District of Columbia, Maryland and Florida. He is the author of the book, "Real Estate Practice: New Perspectives," published in 1996 by the Pennsylvania Bar Institute.*

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### TRUST ACCOUNT SEMINAR

The seminar will cover the Administrative Rules for trust accounts established under the Utah Real Estate license law. (Taught Live)

**Location:** 2970 East 3300 South, Salt Lake City

**Dates:** December 1, January 5, February 2

**Time:** 9:00 am to 12:00 noon

**Credit:** 3 hours continuing education

You **MUST PREREGISTER** by sending \$5 with your name, address, phone number and license number to:

**Division of Real Estate**

**PO Box 146711**

**Salt Lake City, UT 84114-6711**

You will receive a phone call confirming your registration the week of the seminar.



## Fair Housing Act: Handicap Inquiry Held Illegal



The line between permissible and impermissible inquiries under the Fair

Housing Act is a very narrow one, as shown in a decision of the Supreme Judicial Court of Maine interpreting a regulation dealing with disability. *Robards v. Cotton Mill Associates*, 713 A2d 952 (Maine 1998).

In that case, Gordon Robards filed a complaint with the Maine Human Rights Commission, alleging that Cotton Mill, a federally subsidized housing project, made illegal inquiries regarding his handicapped status. Inquiry in the application form was as follows:

“Statement of health including any disabilities (statement of your doctor should be used here). Physician should state a brief description of your medical condition, disability and/or handicap and whether you are able to care for yourself if living alone and/or able to care for an apartment.”

### Federal Regulation

The relevant regulation under the Fair Housing Act (CFR 100.202(c)) makes it unlawful to inquire about an applicant's handicap except for the following two inquiries: (1) whether the applicant has the ability to meet the requirements of ownership or tenancy; (2) whether the applicant is qualified for a dwelling that is available only for handicapped persons.

The trial court found that the inquiry in this case violated the regulation and awarded Robards a civil penalty of \$1000 plus attorney fees. Cotton Mill appealed.

### Judgment Affirmed

Neither party challenged the second inquiry in the

Cotton Mill application relating to the applicant's ability to care for himself and the apartment. The first inquiry, requiring a physician to describe the applicant's medical condition, was in issue. The purpose of that inquiry is to determine whether the applicant is eligible for housing available only to persons with handicaps. A landlord, however, cannot require the applicant to provide a description of his handicap, and the language in the Cotton Mill application does seek to do so, and therefore, exceeds the scope of the permissible inquiry permitted by the regulation.

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### Real Estate Licensee Summary Report (as of June 30, 2000)

#### ACTIVE

|      |                                          |      |
|------|------------------------------------------|------|
| CN - | Registered Real Estate Companies         | 1808 |
| MN - | Registered Property Management Companies | 78   |
| BO - | Branch Offices                           | 108  |
| PB - | Principal Brokers                        | 1889 |
| BB - | Branch Brokers                           | 108  |
| AB - | Associate Brokers                        | 942  |
| SA - | Sales Agents                             | 7486 |

#### INACTIVE

|      |                   |      |
|------|-------------------|------|
| PB - | Principal Brokers | 439  |
| SA - | Sales Agents      | 3631 |

TOTAL 16,489

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